

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Notice of Market-Dominant
Price Adjustment

Docket No. R2013-10R

PUBLIC REPRESENTATIVE REPLY COMMENTS

(August 31, 2015)

The Public Representative hereby submits reply comments in response to the initial comments filed August 17, 2017 in these proceedings by the Postal Service, the Greeting Card Association, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, and jointly by the Association for Postal Commerce (PostCom), Alliance of Nonprofit Mailers (ANM), Major Mailers Association (MPA), the Association of Magazine Media (MPS) and National Postal Policy Council (NPPC), (collectively Post Com, *et al.*).¹

I. INTRODUCTION

A. A Clear and Comprehensive Regulatory System is Needed.

The Commission has never adopted a clear and comprehensive regulatory system for measuring the revenue impact of DMM changes, dating all the way back to the PRA era in 1970. The Commission has consistently recognized the difficulty of translating DMM changes into MCS changes, and thus classification changes. This is not an easy task. In initial comments, the Public Representative outlined a system that would accomplish meaningful oversight with minimal burden. The court's remand

¹ Comments were filed pursuant to the Order Establishing Procedures on Remand and Requesting Public Comment, July 15, 2015 (Order 2586) and Order Granting Extension of Time to File Comments, July 28, 2015 (Order No. 2621).

required the Commission to “enunciate an intelligible standard and then reconsider its decision in light of that standard.”²

The standard should be to review all mail preparation requirement changes for revenue impact. As detailed in the Public Representative’s initial comments, this review should occur both before and after the changes, putting accuracy ahead of immediacy.

1. The Postal Service’s comments highlight the need for a comprehensive system for rate filings.

The Postal Service’s comments do not sufficiently address the problem presented by the court’s remand.³ The inadequacies of the Postal Service’s comments for resolving the issues on remand are addressed below. The solutions presented by the Postal Service appear to ignore the court’s holding regarding mail preparation changes noticed in the Domestic Mail Manual (DMM). The Postal Service’s alternative solution for a bright-line standard would identify changes in the size, weight, or minimum-volume eligibility that define products in the MCS as a test for filing for a rate change.⁴ That alternative solution fails to offer a satisfactory bright-line test for rate change filings. If further input is required from interested persons pursuant to proposed changes in the *de minimis* rules or other rule changes, hopefully the Postal Service will advance more thoughtful suggestions.

2. PostCom, *et al.*’s proposed standard for rate filings only moves part of the way towards a standard test for rate change filings.

PostCom, *et al.* recognizes the current *de minimis* rules provide some standards for measuring the need for rate filings, but PostCom, *et al.* does not recognize that the current rule is insufficient as a filing standard.

² *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740 (D.C. Cir. 2015) at 29.

³ *United States Postal Service v. Postal Regulatory Commission*, 785 F.3d 740 (D.C. Cir. 2015).

⁴ Initial Comments of the United States Postal Service, August 17, 2015 at 24.

B. Further Rulemaking is Needed.

The Petition filed by PostCom, *et al.* in Docket No. RM2015-20 proposes additional rules that are desirable, but additional changes to the rules are needed for a workable, efficient rate filing standard. Additional modifications to the current *de minimis* rules are necessary to establish a standard for filing rate changes that complies with the court's remand.

The Rulemaking Petition filed by PostCom, *et al.* addresses an area of need, as the Commission will have to amend its rules after this case is completed. However, the Commission should not amend its rules until this case is completed. The amended rules should address the standard developed by the Commission in this docket. To be clear, the rulemaking docket should not be used as a mechanism to litigate the standard, simply one to implement the standard.

II. REPLY TO POSTAL SERVICE COMMENTS

In its initial comments, the Postal Service makes two proposals for dealing with price cap implications of mail preparation requirement changes. Its preferred position is that no mail preparation requirement changes implicate the price cap unless the Postal Service specifically dictates that they do. The Postal Service states that the “most reasonable approach is to apply the price cap only to changes in posted rates, a path that the court left open to the Commission.” Postal Service Initial Comments at 2. It further details a backup alternative in which only a small subset of requirement changes would implicate the price cap. The Postal Service states that a “less attractive alternative would be to adopt a rule under which only changes to posted rates and to the size, weight, or minimum-volume thresholds that define products in the Mail Classification Schedule (MCS) would have price cap impact.”(footnote omitted.) *Id.* at 2. In a footnote, the Postal Service notes that the size, weight, and minimum-volume thresholds are identified in the MCS, not the DMM. This distinction is important, as both of the Postal Service proposals would limit price cap review to MCS changes only.

There are two reasons why the Postal Service's proposed standards are inapplicable and should be rejected by the Commission. First, the Postal Service's proposals are an attempt to force mailers to bear the entire burden of the impact of mail preparation requirement changes. Second, the rationale driving both of these proposals has already been rejected by the Commission and the court.

A. Postal Service Proposes That Mailers Bear All the Impact of Mail Preparation Requirement Changes.

The Postal Service recognizes that mail preparation requirement changes can impact mailers. It provides a historical example of such a change, the flats "drop test." As discussed on pages 13-14 of its initial comments, in 2010 the Postal Service implemented new standards regarding the allowable flexibility of flat-shaped mail. The Postal Service required that flat mail be less flexible in order to continue to qualify for automation prices. The Commission was never provided notice of this change, as it did not directly correspond to a market dominant price change docket. The Postal Service notes that this was a controversial change, and states that the change would have been "impractical if the Commission were also involved in determining the price cap impact (both positive and negative) each time the rule was adjusted." Postal Service Initial Comments at 14.

The Postal Service implemented this change and unilaterally decided that the change had no price cap impact. But it also acknowledges that the new standard caused a change in mailer behavior and may have led to an increase in prices for some mailers. By unilaterally deciding the change had no impact, the Postal Service forced mailers to pay for all of the costs associated with its decision, a direct work around of the price cap.

On pages 10 to 13 of its initial comments, the Postal Service discusses a hypothetical change:

Assume that the hypothetical mail preparation change described above would save the Postal Service \$200 million, with transition costs to the Postal Service of \$50 million, and that the change receives mixed feedback from mailers, with some supporting the efficiency gains for the Postal Service and others objecting to the mailer costs required to meet the new requirement. The Postal Service might conclude that proceeding makes sense only if there is no price cap impact. But the information about whether there would be a price cap impact may not be available until well after the decision whether to proceed with the mail preparation change needs to be made. Under the Commission's framework, the Postal Service might not have gone forward with actual mail preparation changes that improved the Postal Service's efficiency, if there would be a revenue loss if the Commission treated the change as a price change subject to the price cap. Postal Service Initial Comments at 12-13.

The Postal Service's argument is that mail preparation changes are too complex for the additional layer of the price cap to be included. The Postal Service is arguing that because of the uncertainty involved in Commission review, it may decide not to pursue operational efficiencies. But this exact rhetorical approach is exactly why price cap review of mail preparation requirement changes is necessary. Suppose, in the Postal Service's hypothetical, that mailers would have to spend \$1 billion dollars to implement that change proposed by the Postal Service, or face \$2 billion in extra postage if they do not follow the new regulation.

The Postal Service proposes a system where it is allowed to achieve savings at the expense of all mailers, regardless of the comparative size of the savings or expense. The Postal Service is correct that Commission review will be an additional burden, but this burden is of vital importance. The Postal Service argues that calculating a cost/benefit analysis of proposed changes is too burdensome. The Public Representative argues that the calculation of the cost/benefit tradeoff is vital for a government mandated monopoly.

B. Postal Service's Primary Proposal Must Be Clearly and Forcefully Rejected By the Commission.

The Postal Service states that the “most reasonable approach is to apply the price cap only to changes in posted rates, a path that the court left open to the Commission.” *Id.* at 2. This is not the most reasonable path forward. It would not be in the best interest of any postal stakeholder, even the Postal Service itself. The Postal Service has made mail preparation requirement changes in a form that complies with reasonable price cap review since the enactment of the PAEA. The Postal Service seeks unilateral control over when the price cap is involved.

Most recently, the Postal Service revised FSS (Flats Sequencing System) requirements, eliminating Carrier Route presorting in FSS zones. The Postal Service could have accomplished this by making a DMM change, and not provided a new FSS price for mailers. It could have simply chosen to revoke the Carrier Route option in FSS zones. But the Postal Service realized this was not in its best interest. In Periodicals, for example, the Postal Service gained price cap authority by appropriately accounting for DMM changes in Docket No. R2015-4.

The imposition of Full Service IMb would have been a price change, and Commission should not adopt any standard that would not enforce a level of oversight that would include such a change.

C. Secondary Proposal Must Also Be Clearly and Forcefully Rejected By the Commission

The Postal Service also provides a backup proposal: “One less attractive alternative would be to adopt a rule under which only changes to posted rates and to the size, weight, or minimum-volume thresholds that define products in the Mail Classification Schedule (MCS) would have price cap impact.” In Order No. 1890,⁵ the

⁵ Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013 (Order No. 1890).

Commission determined that, “In sum, the Full Service IMb mail preparation requirements result in the redefinition of rate cells because they necessitate a change in the basic characteristics of a mailing in order for the mailing to qualify for the same rate category for which it was eligible before the new requirements.” *Id.* at 28.

The Postal Service again discusses reasons why its own standard should not be applied. The “alternative” standard it offers specifically does not include changes to bundle minimums, which it has admitted in the past would implicate the price cap. It states:

Rate distinctions based on mailer behavior are aimed at structuring a mailer’s economic choices to provide incentives leading to efficient Postal Service processing, and to allocate the costs of less efficient processing. As such, they form part of a dynamic give-and-take process of resource allocation between the Postal Service and mailers.” Postal Service Initial Comments at 27.

In order for there to be a dynamic give-and-take regarding mail preparation changes, there must be price cap review of such changes. The Postal Service recognizes that mail preparation requirements can drive mailer decisions, and mailer postage:

To be sure, certain mail-preparation requirements, such as levels of presortation, are significant enough that they form the basis for rate distinctions in the MCS. As discussed in the previous section, the Commission has ample power to review changes to these requirements through its ability to regulate workshare discounts and mail classifications, and its ability to hear complaints about Postal Service regulations. These clear opportunities for regulatory oversight stand in stark contrast to the haze surrounding any attempt to deal with mail classification changes through the price cap.” Postal Service Initial Comments at 28.

The Postal Service here offers the Commission an alternative path, moving away from market dominant price change dockets and toward alternative docket procedures, such as the complaint procedures. The Public Representative agrees that 45 day market dominant price change dockets do not allow the Commission and stakeholders

sufficient opportunity to fully understand any and all mail preparation requirement changes. In its initial comments, the Public Representative suggested that the Annual Compliance Report proceeding is an acceptable venue for a full review of all changes. The Commission should leverage the opportunity provided by that report docket to provide regulatory oversight.

III. REPLY TO POSTCOM, *ET AL.* INITIAL COMMENTS

A. The PostCom, *et al.* Proposal Offers Only a Partial Solution for a Rate Filing Standard.

The Public Representative agrees with the PostCom, *et al.* comments that the four factors presented in Order No. 2586 do not represent an “articulable principle for distinguishing between mail preparation changes with and without rate effects.” PostCom, *et al.* at 4. While some proposed factors would be relevant to a test, they do not offer an objective bright-line test. In certain cases, sufficient data would not be available to the Postal Service or the Commission; such as a measure of the impact of a preparation change on mailers’ costs.

PostCom, *et al.* recognizes the value of the *de minimis* rules at 39 C.F.R. § 3010.30, already in place, as a starting point for a workable standard. PostCom, *et al.* Initial Comments at 1. It also comprehends that, “All changes to mail preparation requirements can be viewed as changes in rates to the extent they impose costs on mailers or change eligibility for specific rates...The key consideration is the postage or other costs imposed on mailers.” *Id.* at 3-4. Yet, PostCom, *et al.* also understands that it is “impractical and undesirable for the Postal Service to file a notice of rate change every time the Postal Service change to the DMM or otherwise modifies preparation or eligibility requirements.” *Id.* at 3.

PostCom, *et al.*’s proposed alternative test based on the Commission’s current *de minimis* rules looks in the right direction, but it does not suggest necessary revisions for a workable filing standard to cover all mail preparation changes potentially affecting

Postal Service revenue. Rather, the revenue impact for mail preparation changes must be measured initially by the Postal Service. It is important for the Postal Service to measure this impact before implementation so that it may file a rate case or notify the Commission if the revenue change is *de minimis*.

1. Because the *de minimis* rules apply to all rate changes, they do not provide a satisfactory bright-line test for mail preparation changes.

While PostCom, *et al.*'s alternative looks in the right direction toward the *de minimis* rules, which were available to the court but were not addressed, the Public Representative is concerned the current *de minimis* rules do not fulfill the requirements of the court's remand. The alternative offered moves only part of the way toward a satisfactory bright-line test.

The *de minimis* rules currently apply on their face to all rate increases where the "percentage change in rates" for the class is less than 0.001 percent. Nowhere in the rules is a change in rates defined as including an increase in postal revenue due to mail preparation changes. The *de minimis* rules do not recognize that any change in mail preparation requirements forcing mail to shift from one rate category to another without a change of behavior is a rate change. The magnitude of the mail preparation change does not determine whether there is a rate change under the provisions of the rules. The rules leave for Postal Service interpretation the determination of what is a rate change. Although the court determined DMM changes may constitute a rate change, the court did not determine that all DMM changes constitute a rate change. As the *de minimis* rules stand, they continue to leave for the Postal Service the option to determine if a DMM change is a rate change and, if so, to determine with its own calculations whether the rate impact is *de minimis*.

Consequently, the rule should be clarified in accordance with the court's ruling that rate changes include revenue impacts resulting from mail preparation changes in the DMM or otherwise. The *de minimis* rule needs to be clarified to insure that it is

applicable whenever a change in mail preparation requirements affects the Postal Service's revenue.

2. The *de minimis* rules do not provide a cut-off for very small revenue changes.

The *de minimis* rules require the Postal Service to file a notice with supporting workpapers demonstrating that the sum of all rate increases included in *de minimis* rate increase since the most recent Type 1-A, Type 1-B or Type 3 notice of rate adjustment that was not *de minimis* does not result in a *percentage* change in rates for the class equaling or exceeding 0.001 percent. 39 C.F.R. § 3010.30(e). There is no cut-off for very small rate changes. If the *de minimis* rules are to apply (as they should) to mail preparation changes, there should be a cut-off for cases in which mail preparation changes would result in very small revenue changes. Otherwise, a notice for each and every mail preparation change, together with workpapers, must be filed with the Commission under the current *de minimis* rules. In order to reduce the inefficiency for reporting at the time of implantation of every mail preparation change conceivably affecting revenue, the Commission should consider a cut-off provision below which a notice of *de minimis* rate change is not necessary until the end of the year at the time of filing the ACR.

3. Adjustments to *de minimis* revenue change amounts.

Along with the above rules amendments, the Public Representative also proposes that the current *de minimis* amount should be increased from 0.001 percent to 0.005 percent and that a lower percentage amount such as 0.001 percent be incorporated into the rules below which a revenue change would not need to be noticed at the time of the mail preparation change. This would relieve the Postal Service of continually filing notices with the Commission throughout the year for each mail preparation change. Any such changes not meeting the minimum *de minimis* trigger

would be certified as a change by the Postal Service later in the ACR when the volume estimates would be checked against the actual volume and consequent revenue impact.

B. Full Analysis Is Needed, Including an After the Fact Check.

The Public Representative supports the need for rules change proposal by PostaCom, et al. in its Petition to *certify* that all rule changes have only a *de minimis* effect. A similar proposal for certification presented in the Public Representative's initial comments is needed to ensure the impact of the Postal Service's *de minimis* analysis is properly measured. This can be accomplished by review and verification of the impact of mail preparation and other changes that are undertaken in the interim between full-blown rate adjustment filings. Under current *de minimis* rules, an initial Postal Service analysis of the revenue impact of rate changes (but not necessarily mail preparation changes) is required. But where the Postal Service's analysis determines there is no rate change, the analysis does not see the light of day. The Commission does not have an opportunity to verify the analysis.

Therefore, the Public Representative proposes amendment to the rules to require the Postal Service to certify in the ACR that each of its mail preparation changes and other rate changes, where no notice of rate change or a full-blown rate case was filed, did not result in a rate change exceeding the *de minimis* rule amount.⁶ The Postal Service should be required to report the revenue impact of the changes in its ACR. This will provide the Commission and other interested persons the opportunity to review the impact of all mail preparation changes to ensure the Commission and interested

⁶ PostCom, et al. proposed a similar type of certification for future cases in Docket No. RM2015-20, Petition of the Association for Postal Commerce and Alliance of Nonprofit Mailers to Initiate Rulemaking Proceeding, August 17, 2015 at 2. It proposes that the Postal Service be required to certify that not only all rate changes since the last rate adjustment are *de minimis*, but that all rule changes (*i.e.* "mail preparation rule changes") have only a *de minimis* effect on mail preparation costs and rates. PostCom, et al., Petition at 2. A certification on the *de minimis* rate impact is reasonable and desirable, but the Postal Service could not certify, as PostCom, et al. proposes, to the *de minimis* effect on mail preparation costs of mailers.

persons have the opportunity to review all effective rate changes, including those involving mail preparation changes and to make appropriate price cap adjustments.

C. Proposed Solution to Inequitable Use of Historical Volumes

1. Analysis with estimated data should be subject to price cap adjustment.

The Public Representative's initial comments responded to the Commission's invitation for proposals to move away from using backward-looking historical volumes (with known changes) toward a forward-looking index when mail preparation changes are implemented and available information is not accurate. Order No. 1890 at 25 n. 45; Public Representative Comments at 2. Under the Public Representative's proposal for purposes of determining revenue impact of a mail preparation change, the Postal Service could estimate mailer behavior responsive to its mail preparation changes rather than requiring strict adherence to a backward weighted index based on historical volumes. *Id.* at 15-17.

In short, the Public Representative proposes providing the Postal Service the option to estimate future mailer behavior pursuant to mail preparation changes for purposes of calculating the revenue impact of a mail preparation change in accordance with the *de minimis* rules. The option would have a string. If it is determined during review of the ACR that the Postal Service misestimated the impact of mailer behavior on volume, the future price cap shall be adjusted to reflect the difference in revenue between the revenue based on the Postal Service's estimated volume and the revenue based on the volume based on historical volumes. *Id.* at 16.

This proposed methodology would permit the Postal Service to continue to estimate historical usage using the best available data. When estimating the revenue impact of a mail preparation change, the Postal Service could, at its option, depart from the Commission's rules requiring historical volumes except for known changes, if the currently available data is not accurate. Upon receiving a report of each change by the

Postal Service in the ACR, where the Postal Service applied its own forward-looking volume estimates, the Commission would compare the revenue impact using the volumes the Postal Service estimated at the time of the mail preparation requirement change with the actual volumes. Actual information should be used for the comparison to ensure that the pre-implementation estimates from the Postal Service reflect reality. Any difference in revenue, and thus use of price cap authority, would be applied to adjust the future available price cap limitation.

This rule would be responsive to the Postal Service's request in its comments for a bright-line rule providing stakeholders clear notice of when a proposal will be evaluated un 39 U.S.C. 3622(d)(1). Postal Service Comments at 1-2.⁷ The advantage of this rule is to allow the Postal Service to undertake changes such as the IMb change which is prohibitive under current rules when it believes the historical volumes would not all migrate to more expensive rate cells where there is an introduction, deletion or redefinition of a rate cell. It would allow the Postal Service to undertake mail preparation changes it believes will enable it to operate more efficiently, but will limit the potential downside harm to mailers by restricting the Postal Service's ability to institute mail preparation changes that result in increased revenue to the Postal Service without filing for or notifying the Commission of a rate change.

2. Mail preparation changes would be subject to immediate review upon motion or complaint.

It might appear that providing the Postal Service an opportunity to estimate the impact of its mail preparation change on mailer behavior would allow it to game the system. The Postal Service, for instance, might not properly estimate the impact on

⁷ The Postal Service's alternative that the Commission establish a bright-line standard that applies only to changes in the size, weight and minimum volume requirements (Postal Service Initial Comments at 25-29) ignores the potential impact of many other changes that clearly impact Postal Service revenue and which, unless addressed, would pierce the price cap. The Postal Services claim that under its alternative approach, "changes in mail preparation, content, or other thresholds never would" have price cap implications (Postal Service Initial comments at 28) is belied by its IMb changes in this docket.

mailer behavior, and conclude that mailer behavior will change such that the result is a *de minimis* impact on revenue, thereby avoiding the need to file a full-blown rate case. However, there are checks on this. The Public Representative proposes the result of the estimates is to be compared with the historical volumes in the ACR. If the Postal Service misestimates volume, the price cap will be reduced accordingly.

Moreover, persons who believe a mail preparation change amounts to a rate change may file a motion for relief or complaint with the Commission seeking immediate review of the Postal Service's conclusion that the impact of a mail preparation change is *de minimis*, or even below the cut-off level proposed by the Public Representative. PostCom, *et al.*'s petition in Docket No. RM2015-20 also recognizes this possibility and seeks a change in the *de minimis* rule to specifically provide mailers with an opportunity of at least 15 days from notice of the change to contest changes in Postal Service mailing requirements. PostCom, *et al.* Petition at 4. While the proposal has a laudable purpose, the Commission would have little basis to review the impact of such a change within a reasonable period of time based solely on the notice of change. It appears unlikely a meaningful review could occur within the short time frame prior to implementation of a mail preparation change.

IV, CONCLUSION

The Postal Service's approach is not a meaningful attempt at providing a workable rate filing standard, while the PostCom, *et al.* standard is halfway there. There remains a need for a two-part rate filing system as further detailed in the Public Representative's initial comments.

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully Submitted,

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